No. 12000

In the United States
CIRCUIT COURT OF APPEALS
for the Ninth Circuit

GERTRUDE I. DOWNING and PERRY LYNN DOWNING, SR.,
Appellants,

vs.

DOROTHY A. DOWNING and UNITED STATES OF AMERICA,
Appellees.

BRIEF OF APPELLEE, DOROTHY A. DOWNING

Upon Appeal from The United States District Court for the District of Oregon.

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STATEMENT OF THE CASE

This is an appeal from an action instituted by the appellee, Dorothy A. Downing, wherein she sought a determination of the court that she was the beneficiary of a National Service Life Insurance Policy. This policy was issued to her husband, Perry Downing, Jr., a lieutenant in the U.S. Army Air Force, who was killed.

Dorothy Downing and Perry Downing, Jr., had "gone together" four years and then became engaged

in February, 1943. Four days later he entered the army (Tr. 20). In April, 1943, Perry Downing, Jr., applied for National Service Life Insurance and not being as yet married, he named his mother, the appellant, Gertrude I. Downing, as principal beneficiary and his father, Perry Lynn Downing, Sr., as contingent beneficiary (Pltfs' Ex. No. 6). In September, 1943, Dorothy Downing and Perry Downing, Jr., were married, and they made their home together at various Army air fields (Tr. 20). On January 1, 1945, while they were living at Chico, California, Lieutenant Downing was alerted for overseas movement (Tr. 43). At that time, or shortly thereafter, he told his wife he was going to make her his insurance beneficiary and later on the same day, when he returned home, he told his wife he had made her his beneficiary (Tr. 31). In January, 1945, and in April, 1945, Lietutenant Downing executed Personal Affairs Statements, official documents required by the Army, in which he stated that his wife, Dorothy Downing, was the beneficiary of his National Service Life Insurance. (Pltf's. Exs. Nos. 4 and 5). Copies of these statements were sent to his wife and the letter of transmittal, written by the Army, stated that his wife, Dorothy Downing, was Lieutenant Downing's insurance beneficary. (Pltf's. Exs. Nos. 20 and 21).

On these same statements, Lieutenant Downing stated that his wife was to receive a $200.00 a month allottment, was to be the beneficiary of his death gratuity, and was his emergency addressee; the allotment and death gratuity were paid to Dorothy Downing without question (Tr. 24).

In April, 1945, Dorothy Downing came home to have their child, and a daughter, Linda, was born in June, 1945 (Tr. 24).

At some time during this period subsequent to January 1, 1945, Lieutenant Downing told a fellow officer and friend, Glenn Bauman, of his intention to change his insurance beneficiary, and they, Bauman and Downing, went together into the Army headquarters at Chico to change their insurance beneficiaries (Tr. 48). At this time Glenn Bauman saw Lt. Downing execute a document (Tr. 48, 51, 53). When they departed from headquarters, Lieutenant Downing told Bauman that he had taken care of his insurance (Tr. 49).

Shortly before Lieutenant Downing was sent overseas, the appellants, Dorothy Downing and daughter, Linda, came to visit Lieutenant Downing (Tr. 44, 61). Subsequently, the appellant, Gertrude I. Downing, executed an affidavit in which she stated that during this visit her son told her he had executed the necessary documents to leave everything to his wife (Pltf's Ex. No. 2).

Lieutenant Perry Downing, Jr., was killed on October 3, 1945 (Tr. 25).

The Board of Veterans Appeals, expressly on the authority of *Bradley vs. U.S.,* 143 F. (2d) 573 (CCA 10th), denied the claim of the widow, Dorothy Downing (Deft's. Ex. No. 17).

The appellee filed her complaint herein, and in answer thereto, the United States of America admitted

liability on the policy and prayed that the other parties in the action interplead their respective claims to the proceeds of the insurance policy; the trial court ordered such interpleader (Tr. 19).

The trial court, sitting without a jury, found that Perry Downing, Jr., had duly designated his wife, Dorothy Downing as the beneficiary of his National Service Life Insurance Policy, but the document so designating was inadvertently lost while it was in the possession of the United States Army, and the trial court entered judgment for the plaintiff, the appellee, Dorothy A. Downing.

SUMMARY OF ARGUMENT

The appellee, Dorothy Downing, contends that the trial court's finding of fact that Perry Downing, Jr., duly executed a change of beneficiary designating his wife as principal beneficiary of his insurance, but said change of beneficiary was inadvertently lost while in the possession of the U. S. Army, is amply supported by the evidence, and therefore, cannot be set aside as clearly erroneous.

This appellee further contends that whether or not this finding is clearly erroneous is the only issue presented to this Court by this appeal. The appellants direct most of their brief to the question of whether certain exhibits and statements are sufficient to constitute a change of beneficiary. The trial Court did not find it necessary to decide this issue as it found that an actual

change of beneficiary had been executed but had been lost.

The appellee, Dorothy Downing, submits that had the trial court found that the execution of certain documents by the deceased coupled with the statements and other activities and circumstances of the deceased did constitute a change of beneficiary, such a finding would also have been supported by the evidence and not be clearly erroneous. For this reason, the appellee submits an answer to the appellants' arguments concerning this hypothetical finding, which arguments are advanced under First Specification of Error.

ARGUMENT ON FIRST SPECIFICATION OF ALLEGED ERROR

The trial court did not hold or find that a Personal Affairs Statement (Pltf's. Ex. No. 4) and statements made by the deceased constituted a change of beneficiary. If the Court had found that a Personal Affairs Statement (Pltf's. Ex. No. 4) and statements made by the deceased constituted a change of beneficiary, this evidence, together with other evidence admitted at the trial would have fully supported such a finding.

National Service Life Insurance is regulated by the Veterans Administration. The applicable Veterans Administration regulation stated that a change of beneficiary should be made by a notice in writing to be signed by the insured and forwarded to the Veterans Administration. A change of beneficiary of National Service

Life Insurance can undoubtedly be duly effected without compliance with the Veterans Administration regulations. The appellants do not seriously contend to the contrary. In all of the cases cited by appellants no compliance with the regulation was even suggested, and yet in all of these decisions, except *Bradley vs. U. S.,* 143 F. (2d) 573 (CCA 10th), the Court found that a change had been effected. Even in *Bradley vs. U. S., supra,* at p. 576, the court recognized that compliance with the Veterans Administration regulations was unnecessary.

> "Strict compliance with the applicable regulations is not however requisite to the maintenance of that burden of proof (burden to show a change of beneficiary) * * * With respect to regulations pertaining to the authorized change of beneficiary in war risk insurance cases, the courts have brushed aside all legal technicalities in an effort to effectuate the manifest intention of the insured."

These regulations are for the protection of the insurer, the Veterans Administration. The active parties in this appeal are claimants to the benefits of this insurance and neither can invoke the aid of a regulation intended for the benefit of the insurer. In this action, the United States, representing the insurer, did not invoke the protection of the regulation but rather by their answer waived compliance with the regulation and admitted liability on the policy and prayed for an order of interpleader requiring the clamants to interplead their respective claims and the trial court so ordered (Tr. 9, 19).

The purpose of the regulation and a waiver by the United States were illustrated in *Collins vs. U. S.,* 161 F. (2d) 64, 70 (CCA 10th).

> "But there is yet another reason why the judgment must be reversed. The purpose of a regulation designating the manner in which a change of beneficiary under a National Service Life Insurance policy should be made is for the convenience and protection of the government, and may be waived by it."

It appears to this appellee that the requirements of Veterans Administrations regulations are not material or relevant to the issue in this appeal.

All the decisions concerning whether or not a change of National Service Life Insurance beneficiary has been accomplished are in agreement on the general rule of law to be applied. The two elements composing this general rule are stated by the Court in *Shapiro vs. U. S.*, 166 F. (2d) 240, 241 (CCA 2nd).

> "The decision was essentially based on findings of the judge that the insured had expressed an intention to change the beneficiary originally named in his policy and had done an affirmative act to effectuate the intention. Whether these findings are correct is the chief dispute on the present appeal. We can see no reason to doubt that they are supported by substantial evidence and that the judgment rendered was not only justified but required by the proof."

In the present action, the trial court had an abundance of evidence from which it could find that the deceased soldier had the intent to change his beneficiary and did affirmative acts to effectuate this intention.

Appellants do not appear to seriously question that there is adequate evidence of the requisite intent, but in this regard mention supposed marital difficulties between

the deceased and this appellee (App. Br. 8). It was admitted at the trial that any possible objective evidence of these supposed difficulties occurred after Lt. Downing went overseas and after the occurrences which the appellee relied upon to establish a change of beneficiary (Tr. 35).

The fallacy of the innuendos appellants ascribe to the deceased's acts and statement is illustrated by one conclusion stated by the appellants in their brief:

> "This intention (to not remain with his wife) is also borne out by his statements that he wanted to remain in the Armed Services." (App. Br. 8)

In considering the second requirement, affirmative acts to effectuate the intention, appellants attempt to fit this case into the facts of *Bradley vs. U. S., supra,* by mentioning only one of the several positive affirmative acts of Lieutenant Downing; they mention only the one Personal Affairs Statement (Pltf's. Ex. No. 4).

If it were assumed that the facts in *Bradley vs. U.S., supra,* were comparable to those here involved, this Court need not find such decision persuasive as it does not represent the consensus of judicial opinion on this subject; on the contrary, it is the only decision holding a change of beneficiary was not accomplished.

In *Bradley vs. U. S., supra,* there was a dissent by Judge Phillips. The dissenting judge was of the opinion that the executing of a Personal Affairs Statement together with the acts recited in the Statement were sufficient to bring about a change of beneficiary. Judge

Phillips' view was approved in *Shapiro vs. U. S., supra,* at p. 242. The Court said:

> "If the Bradley decision be thought to differ, the conclusion reached in the dissenting opinion of Judge Phillips accords with our own views."

A like opinion was held by the Court in *Mitchell vs. U. S.,* 165 F. (2d) 758 (CCA 5th) and in *McKewen vs. McKewen,* 165 F. (2d) 761 (CCA 5th).

In *Mitchell vs. U. S., supra,* the deceased soldier executed a government insurance report form stating that his wife was his beneficiary. The Court stated at page 760:

> "The case presents only the question as to whether Harwick's naming his wife the beneficiary on the government insurance report form can be considered such an affirmative act as to evidence an exercise of his right to change the beneficiary."

The Court held that a change had been accomplished.

In *McKewen vs. McKewen, supra,* two Officers' Data Sheets similar in form and identical in purpose to a Personal Affairs Statement, together with a government insurance report form, were held to be sufficient evidence of a change of beneficiary. In the opinion the Court said concerning these Data Sheets:

> "We place much stress upon the fact that the two documents signed in Kearney, Nebraska, and the one signed at his station in Europe were official documents—signed by an officer of the United States Army on the direction of the insurer, his government. Assuredly, they were not false. The declarations in these documents are not in the category of unofficial, ex parte or oral statements

made to the wife or to the mother in response to inquiries, or in answer to protests against the making of someone the beneficiary."

It is the appellee's belief that it is not necessary in the present appeal for the Court to determine the correctness of either the majority opinion in *Bradley vs. U. S., supra,* or the other decisions above cited. This appellee submits that there is present here evidence of a kind that was not present in *Bradley vs. U. S., supra.* In this case, in addition to the one Personal Affairs Statement, there was introduced into evidence a second Personal Affairs Statement (Pltf's. Ex. No. 5). One was executed December 28, 1944 (Pltf's. Ex. No. 5), and the other April 10, 1945 (Pltf's. Ex. No. 4). Both state that Dorothy Downing, the appellee, is the beneficiary of the officer's insurance. Additional evidence that the appellee was made beneficiary is as follows: Lieutenant Downing told his wife he had been to the base and changed his beneficiary that day (Tr. 23); the deceased soldier, together with Glenn Bauman, a fellow officer, went to their Headquarters and Lieutenant Downing told Bauman that he was going to change his beneficiary and he told Bauman upon leaving the Headquarters that he had taken care of it (Tr. 49); on this particular occasion when the deceased was in Headquarters, Bauman saw him fill out some sort of document (Tr. 48, 51, 53); and the appellant, Gertrude I. Downing, made an affidavit in which she stated: "He told me . . . that he (her son) executed the necessary documents leaving everything to his wife" (Pltf's. Ex. No. 2).

Of course, the fact that Dorothy Downing was the

soldier's wife and the mother of his small child are important in this connection. Lieutenant Downing indicated his regard for this relationship by providing that all other financial benefits which can be awarded by a soldier would be paid to Dorothy Downing (Tr. 24).

Evidence very similar to that here involved was held in *Roberts vs. U. S.,* 157 F. (2d) 906 (CCA 4th), to constitute a change of beneficiary. In that case, a brother officer testified that he and the deceased went to their headquarters to change their insurance beneficiaries and other benefits in favor of their wives. He saw the deceased fill out some documents. No change of beneficiary was ever found, although a confidential report, similar to the Personal Affairs Statement, was found and this report named the wife as beneficiary.

The Court found a change of beneficiary had been effected and stated at page 909:

> "It will be seen that the judgment below rests upon the absence of the change of beneficiary from the Government's files and upon the testimony of the uncle as to his conversations with the insured. It seems clear to us that these factors are insufficient to outweigh the clear and undisputed written evidence in the insured's admitted handwriting that he had designated his wife as beneficiary of the insurance policy, especially since these writings are supported by the disinterested testimony of the brother officer who assisted the insured to change the beneficiary and saw him execute the document and deliver it to the clerk at the Naval air base."

The appellee submits that if the trial court had found that the conduct, statements and Personal Affairs State-

ments of the deceased soldier constituted a change of beneficiary, such a finding would have been correct and fully substantiated by the evidence.

ARGUMENT ON SECOND SPECIFICATION OF ALLEGED ERROR

The trial court did not err in finding that the deceased soldier had executed a change of beneficiary, naming his wife as beneficiary, but that such document was inadvertently lost while in the possession of the United States Army.

There can be no doubt that if a change of beneficiary had been executed by the deceased but later had been lost by the Army, such facts would effectively accomplish a change of beneficiary. The appellants do not contend to the contrary.

Rule No. 52 of the Rules of Civil Procedure states in part as follows:

> ". . . . Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. . . ."

This rule is applicable to the type of case herein involved.

McKewen vs. McKewen, supra, at page 765:

> "We should not disturb the finding and judgment of the court below because there is substantial evidence to support his findings. (Rule 52, Federal Rules Civil Procedure, 28 U.S.C.A. Following section 723c.)"

Therefore, it is evident that unless the trial court's finding is clearly erroneous, the finding and the judgment based thereon must be affirmed.

The evidence that Lieutenant Downing actually executed the necessary documents to change his beneficiary to his wife is the same evidence as outlined in appellee's argument on the first specification of alleged error. Particularly applicable is Bauman's testimony that the deceased filled out a document in Bauman's presence, which Bauman believed to be a change of beneficiary (Tr. 48, 51, 53). Appellants discard this testimony as hearsay (App. Br. 11). Such testimony was not objected to on this ground at the time of the trial. Even if it had been, it would have been admissible. Few, if any cases on this subject, would have been litigated if testimony such as Bauman's was inadmissible.

Because of the military background of this case, the fact that the document changing the beneficiary was not found is not necessarily indicative that it was not executed. In cases involving veterans of both World War I and World War II, courts have taken cognizance of the fact that Army and Navy channels of communication are not as reliable as civilian channels and that essential documents, such as a change of beneficiary, have been lost while under military control.

In *Roberts vs. U. S., supra,* at page 909, the Court commented on this situation as follows:

> "The discrepancy in the dates in other papers and the failure of the change of beneficiary to reach its destination is easily understood when one considers

the volume of business transacted at military posts and the character of the administrative organization thrown together to meet the emergency of war."

In *Walker vs. U. S.*, 70 F. Supp. 522 (S.D. Tex.), it was found that prior to the soldier's death a document reached the Veterans Administration and they were thereby notified that the wife was the deceased's beneficiary. This document was not found when the Veterans Administration was called upon to decide who was the beneficiary of the deceased's insurance. It was not known what kind of a document reached the Administration or of what soldier's benefit the wife was to be the beneficiary. The Court presumed that a proper document had been executed but was lost and found that the insurance beneficiary had been changed to the wife.

Farley vs. U. S., 291 Fed. 238 (D. Ore.). In this case, the Court found that the deceased had signed a blank form which he understood was to change his insurance beneficiary and that the signed document was presented to McDougall, company clerk. No trace of this document was found after it was placed in McDougall's possession. The Court held that a change of beneficiary had been effected by this action on the part of the deceased.

CONCLUSION

The appellee believes it significant that the Federal Judiciary has been required on numerous occasions to

pass upon whether or not a change of beneficiary of National Service Life Insurance has been accomplished, and only in one instance, *Bradley vs. U. S., supra,* did a Court find that a change of beneficiary had not been duly effected. In addition to the cases cited in the briefs of both parties, the following cases also held that a change of beneficiary had been accomplished: *Woods vs. U. S.,* 69 F. Supp. 760 (M.D. Ala.); *Citron vs. U. S.,* 69 F. Supp. 830 (D.C.); *Egleston vs. U. S.,* 71 F. Supp. 114 (L.D. Ill.); *Shannon vs. U. S.,* 78 F. Supp. 263 (N.D. Ga.).

The only issue before this Court is whether or not the finding of the trial Court that a change of beneficiary was executed by the deceased but was subsequently lost is clearly erroneous The appellee, Dorothy Downing, contends that such finding is not clearly erroneous, but, on the contrary, is adequately supported by substantial evidence.

Respectfully submitted,

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